



In The
Supreme Court of the United States
October Term 1978

No. 78-505

BRIAN BRAESCH, et al.,

Petitioners,

vs.

DANIEL DePASQUALE, et al.,

Respondents.

**BRIEF IN OPPOSITION TO PETITION FOR A WRIT
OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF NEBRASKA**

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TABLE OF CONTENTS

	Pages
Questions Presented	1
Statement of the Case	2
Argument:	
I. There was no unconstitutional waiver of pro- cedural due process.	3
II. The Case Is Moot.	4
Conclusion	6

TABLE OF CASES

Aetna Life Insurance Company v. Hayworth, 300 U. S. 227, 57 S. Ct. 461, 81 L. Ed. 617 (1937)	5
Board of Commissioners of City of Indianapolis v. Jacobs, 420 U. S. 128, 95 S. Ct. 848, 43 L. Ed. 2d 74 (1975)	6
DeFunis v. Odegaard, 416 U. S. 312, 94 S. Ct. 1704, 40 L. Ed. 2d 164 (1974)	5, 6
Flast v. Cohen, 392 U. S. 83, 88 S. Ct. 1942, 20 L. Ed. 2d 947 (1968)	5
North Carolina v. Rice, 404 U. S. 244, 92 S. Ct. 402, 30 L. Ed. 2d 413 (1971)	6

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QUESTIONS PRESENTED

Respondents disagree with the statements of questions presented as set forth by petitioners. Petitioners contend that questions 1 and 2 presented are whether a minor or a parent can waive a constitutional right to procedural due process. Respondents contend that these questions are not presented and that the Supreme Court of

Nebraska did not hold that any such waiver occurred in this case.

Respondents now present the question as to whether this matter is moot.

STATEMENT OF THE CASE

Petitioners' Statement of Facts omits the fact that the administrators and board of education first obtained independent legal counsel on January 19, 1977, the date on which the special meeting of the board of education was held. The letter from the parents requesting a hearing was received January 21 as petitioners relate. The school administrators and school board with the assistance of counsel arranged for alternate hearings for the students either before an independent lawyer acting as a hearing examiner or before the board of education. Following hearing before the hearing examiner, the students were assured of right of appeal to the school board all at the student's option. The school administrators and board of education scheduled the hearings to enable a final decision after any hearing and appeal by January 27 and assured that a decision would be made by that date. The students chose not to avail themselves of either the right to a hearing before the independent lawyer acting as a hearing examiner with right of appeal or an initial hearing before the board of education. The school, coaches, and administrators thus gave the students the following opportunities for a hearing:

1. A private meeting with the coach at which time the student specifically admitted his violation of the rules.
2. A meeting with the school principal with parents present at which time there was no denial of guilt.
3. The opportunity for a prompt hearing before an independent lawyer acting as hearing examiner.
4. The opportunity for a hearing before the school district's school board.
5. The right of an appeal from the hearing examiner's decision to the school board if desired.

By requirement of Nebraska law all disciplinary records of the students involved have been destroyed R. S. Neb. 79-4,157. All students involved graduated from high school in the spring of 1978.

ARGUMENT

I.

There was no unconstitutional waiver of procedural due process.

The Nebraska Supreme Court did not, by respondents' understanding of the decision, hold that either the children or their parents had waived any rights of the students to procedural due process. It is respondents' understanding of the decision that the Nebraska Supreme Court held that procedural due process had been afforded the students and that because the students neglected or

refused to avail themselves of the procedural due process available that they had waived any right to "subsequent injunctive relief." Respondents agree with petitioners that the question as to waiver of constitutional rights was not presented by the pleadings, brief, or arguments at either the District Court or Supreme Court level.

At the time these claimed waivers of rights occurred the students were represented by counsel. This representation started prior to the time the petition was filed in District Court; as indicated by petitioners' brief, all of the necessary court documents had been prepared, filed, and a temporary restraining order obtained by the evening of January 21. Consequently, if as respondents deny, the Nebraska Supreme Court held there was a waiver of procedural due process because the students did not obtain a hearing before the hearing examiner or board of education then this waiver was made at a time when the students were represented by counsel who were fully aware of the facts involved.

II.

The Case Is Moot.

Respondents contend that this matter is moot. The petitioners filed a motion in the Supreme Court of Nebraska requesting that the case be dismissed for mootness and filed a brief in support of that motion. In petitioners' brief, in the Nebraska Supreme Court they asserted that the matter in the Nebraska Supreme Court was moot because all of the parties had graduated from the high school, all disciplinary material relating to the students' records and files was required by Nebraska Stat-

utes, Section 79-4,157, to be destroyed upon graduation and because the judgment for costs was not a sufficient matter to destroy mootness.

Respondents resisted with motion in the Nebraska Supreme Court and the Nebraska Supreme Court held that the matter was not moot because it presented an issue of general concern and importance in the state.

This court in *DeFunis v. Odegaard*, 416 U. S. 312, 94 S. Ct. 1704, 40 L. Ed. 2d 164 (1974) held that the irrevocable admission of a student to his final term of the final year of law school rendered the case moot because the issue involved a student's admission into the law school.

This court stated the rules in *Aetna Life Insurance Company v. Hayworth*, 300 U. S. 227, 57 S. Ct. 461, 81 L. Ed. 617 (1937) and *Flast v. Cohen*, 392 U. S. 83, 88 S. Ct. 1942, 20 L. Ed. 2d 947 (1968). In *Aetna* the court stated:

The controversy must be definite and concrete touching the legal relations of parties having adverse legal interests. It must be a real and substantial controversy admitting a specific release through a decree of conclusive character as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.

And, in *Flast* the court stated:

No justiciable controversy is presented when the parties seek adjudication of only a political question, when the parties are asking for an advisory opinion, when the questions sought to be adjudicated have been mooted by subsequent developments, and where there is no standing to maintain the action.

The discretion of the Nebraska Supreme Court to hear and rule on the merits of moot cases is in contrast to the concept of "mootness" in the federal court system. In the federal courts the doctrine of mootness is derived from the requirement of Article III of the federal constitution under which the exercise of judicial power depends on the existence of a "case or controversy". The question of mootness is jurisdictional with the federal courts. *North Carolina v. Rice*, 404 U. S. 244, 92 S. Ct. 402, 30 L. Ed. 2d 413 (1971). The United States Supreme Court recognized this rule in *Board of Commissioners of City of Indianapolis v. Jacobs*, 420 U. S. 128, 95 S. Ct. 848, 43 L. Ed. 2d 74 (1975), in holding that graduation from high school rendered that particular case moot. The court further noted this distinction in *DeFunis, supra*, by stating "as a matter of Washington state law it appears that this case would be saved from mootness by the great public interest in the continuing issues raised by this appeal."

CONCLUSION

Respondents submit, in opposition to the petition of petitioners for a writ of certiorari, the contention that there has been no holding by the Nebraska Supreme Court that there was any waiver of rights to procedural due process by either the students or their parents on their behalf but if there was such waiver it was made by the students while represented by counsel.

The case is moot because the students have graduated from high school and their school disciplinary records have been destroyed.

Respectfully submitted,

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